U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 08 September 2003

BALCA Case No.: 2002-INA-258
ETA Case No.: P2002-NY-02470633

In the Matter of:

COASTAL PIPELINE PRODUCTS OF NEW YORK, INC.,
Employer,

on behalf of

MELVIN ORLANDO CASTILLO-LEON,
Alien.

Appearance: Mario DeMarco, Esquire
Port Chester, New York

Certifying Officer: Dolores Dehaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Heavy Machine Operator."[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On June 17, 1998, Employer, Coastal Pipeline Products of New York, Inc. ("Employer"), filed an application for labor certification to enable the Alien, Melvin Orlando Castillo-Leon ("Alien"), to fill the position of "Heavy Equipment Operator." (AF 74). The position required two years of experience in the job offered. The job was described as follows:

> Drives forklift to locate and distribute materials to specified production area. Unloads and stacks material, may inventory materials and supply workers with materials as needed. May load and unload materials onto lifting device.

On May 11, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 70). The CO found that the position at issue was that of an Industrial Truck Operator, as found in the Dictionary of Occupational Titles ("DOT") at section 921.683-050. The normal requirement for this position was one to three months of combined education, training and/or experience. Therefore, Employer's requirement of two years of experience was excessive. Employer was advised it could rebut this by (1) submitting evidence that the requirement arose from business necessity; or (2) reducing the requirements. If establishing business necessity, Employer was advised that it needed to provide documentation that (1) the job requirements bore a reasonable relationship to the occupation in the context of Employer's business and were essential to perform, in a reasonable manner, the job duties; and (2) that the position existed before Employer filed the application for the Alien. Documentation for the latter rebuttal needed to include position descriptions, organizational charts, payroll records, and resumes of former incumbents, etc. If the job did not exist before the hire of the Alien, then Employer needed to document that a major change in its business operation caused the job to be created before the filing of the application.

Employer, through its President, submitted rebuttal on May 17, 2002. (AF 78). Employer

argued that the requirement of two years of experience arose from a business necessity because the forklift is a very difficult piece of machinery to operate, and therefore at least two years of experience was required. Furthermore, the operator must have a thorough knowledge of Employer's product line and of how a construction job is run, which knowledge requires at least two years of experience. Employer asserted that the position existed before the instant application was filed and enclosed a 1998 W-2 for another forklift operator and an organizational chart.

On June 4, 2002, the CO issued a Final Determination ("FD") denying certification. (AF 80). The CO found that the fact that the Industrial Truck Operator would be operating heavy machinery did not necessarily establish that experience beyond the DOT standard was necessary. Furthermore, Employer's stated need for an Operator with a thorough knowledge of its product line could not be satisfied by requiring more experience in the job, it could only be fulfilled by an Operator with more experience with this particular employer. Additionally, nothing in the ETA form 750A or the job advertisements listed knowledge of Employer's product line as a requirement of the position. While Employer had demonstrated that it had employed other Industrial Truck Operators, it did not demonstrate that they had been required to have two years of experience in the job prior to hire. The CO determined that the Employer had failed to demonstrate that the job and its present requirements existed prior to the filing of the instant application, and that Employer had failed to demonstrate that the restrictive requirement was based on business necessity.

On July 2, 2002, counsel for Employer submitted a request for review of the denial of certification to the Board of Alien Labor Certification Appeals ("Board" or "BALCA"). (AF 90).

DISCUSSION

Along with the request for review filed by counsel for Employer, Employer's President has also submitted a letter. (AF 89). Therein, Employer contends that it has proven that the experience requirement is a business necessity. In a brief filed on October 3, 2002, counsel for Employer reiterates its prior arguments. Specifically, it is Employer's position that it has shown that the

employee must have two years of experience when hired, as its forklifts are not comparable to just any other forklift. Employer contends that it provided information regarding other forklift operators, and set forth additional information regarding these individuals.

This Board will not consider the newly submitted material, as our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R.§ 656.27(c). *See also* 20 C.F.R. § 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the DOT unless it establishes a business necessity for the requirement. The purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. *Analysts International Corporation*, 1990-INA-387 (July 30, 1991).

In this case, Employer has done no more than make bald assertions that it is essential for an employee to have two years of experience as a forklift operator before hire. As the CO noted, Employer failed to document that any of its prior hires had the two years of experience required herein. Employer does not argue that the DOT listing of one to three months of combined education,

training and/or experience for an Industrial Truck Operator is incorrect. Rather, Employer claims it needs an employee with two years of experience because its forklift is not comparable to others. Employer's rebuttal fails to document this assertion, and it fails to establish the business necessity for the two years of experience. Having failed to document a business necessity for the two years of experience being required, it is an unduly restrictive requirement and labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North

Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.